

Wealth Tax Proposal Unconstitutional, Practitioner Says

To the Editor:

S. Douglas Hopkins' analysis in "Factual Distortions Derail Productive Debate on Tax Reform" in the June 18, 2012 issue of *Tax Notes* (p. 1517, *Doc 2012-11567*, *2012 TNT 119-7*) is extremely interesting and thought-provoking. However, there is a fatal flaw in Mr. Hopkins' proposal to solve the problems he addresses by enacting a federal wealth tax: Such a tax would be unconstitutional.

The constitutional issues that would be raised by a federal wealth tax are discussed in detail in my forthcoming article regarding the constitutionality of the exit tax imposed on expatriates and others under section 877A ("Bar the Exit (Tax)! Section 877A, the Constitutional Prohibition Against Unapportioned Direct Taxes and the Realization Requirement," 65 *Tax Lawyer* 181 (2012)). The constitutional status of a federal wealth tax can be summarized as follows:

Article I, sections 2 and 9, of the Constitution, as amended by the Sixteenth Amendment, prohibits Congress from levying "direct taxes" other than taxes on "incomes" unless they are "apportioned" among the states.

1. A federal wealth tax would be a "direct tax."

The Supreme Court has long made it clear that taxes that are "imposed upon property solely by reason of its ownership" are direct taxes subject to the apportionment requirement, whereas taxes that are imposed on a transfer or other specific use of property, such as excise taxes imposed on sales of goods, gift taxes imposed on *inter vivos* transfers of property and estate taxes imposed on transfers of property at death, are indirect taxes not subject to apportionment. See, e.g., *Bromley v. McCaughn*, 280 U.S. 124 (1929) and *Knowlton v. Moore*, 178 U.S. 41 (1900). This constitutional prohibition is why, for example, the federal government does not impose the kind of real property taxes that municipalities throughout the nation routinely (and constitutionally) impose. A wealth tax such as that proposed by Mr. Hopkins would be a tax imposed upon property solely by reason of its ownership, as opposed to a tax on a particular use of the property such as a sale or other transfer of the property, and thus would clearly be a direct tax that, in order to be constitutional, must be either imposed on "in-

comes" within the meaning of the Sixteenth Amendment or apportioned among the 50 states.

2. **A federal wealth tax would not be imposed on 'incomes.'** Because such a wealth tax would be imposed on the value of property, regardless of whether the property generates income or is sold, it would not be considered to be imposed on "incomes" within the meaning of the Sixteenth Amendment. See *Eisner v. Macomber*, 252 U.S. 189 (1920). Contrary to the conventional wisdom in this regard, the central holding of *Macomber* that in the context of property gain, such gain must be realized in order to be considered "incomes" for Sixteenth Amendment purposes has not been repudiated by the Supreme Court in later cases such as *Helvering v. Bruun*, 309 U.S. 461 (1940), *Helvering v. Horst*, 311 U.S. 112 (1940), *Helvering v. Griffiths*, 318 U.S. 371 (1943), *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), *United States v. Davis*, 370 U.S. 65 (1962) and *Cottage Savings Association v. Commissioner*, 499 U.S. 554 (1991). As a result, in order to be constitutional, a federal wealth tax would have to be apportioned among the 50 states.

3. **A federal wealth tax would not (and as a practical matter could not) be 'apportioned.'** For this purpose, a tax is apportioned if it is imposed at rates that ensure that each state's residents collectively bear the tax in proportion to the states' respective populations so that, for example, if the population of New Jersey makes up 3 percent of the total population of the United States, an apportioned tax would yield 3 percent of its revenues from collections in New Jersey. Apportionment of a wealth tax would require applying a different tax rate in each state and, worse still, the tax rate applicable in relatively wealthy states would have to be lower than in less-wealthy states in order to meet the apportionment requirement. Needless to say, this sort of rate structure would among other things be politically impossible.

Consequently, the federal wealth tax that Mr. Hopkins proposes would be unconstitutional.

Mark E. Berg
Feingold & Alpert, LLP
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